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## Economic justifications and Union Citizenship:

### Reallocating welfare responsibilities to the State of origin

Eleanor Spaventa\*

#### I. Introduction

Free movement orthodoxy teaches us that Member States cannot rely on economic justifications in relation to rules that are directly discriminatory;<sup>1</sup> and that economic reasons can be taken into account in order to justify rules that are not directly discriminatory provided that the aim pursued by the measure is not solely economic. This approach is entirely consistent with the premises of an internal market where protectionism should be eradicated, but where Member States should still be allowed to pursue public policy aims which, quite naturally, might carry budgetary constraints. In this respect, the greatest challenge for the interpreter concerns rules that are both economic and inherently territorial, such as tax rules: in those cases, eliminating discrimination without impinging on the integrity of the tax system has not always been easy to achieve. Similarly, the application of internal market rules to fields, such as healthcare, that are particularly resource-sensitive has not been entirely straightforward. Jukka Snell, in another chapter of this collection, analyses the extent to which the ‘no economic justification’ rule is actually supported by a more careful reading of the case law on the free movement provisions. In this contribution, on the other hand, I want to explore how far those hermeneutic guidelines can be transposed to one particular area of free movement, that of citizens. In particular, my contention is that in the field of Union citizenship, the migration of citizens with no connection to the internal market can be limited on economic grounds; and, further, that this tells us something important about what Union citizenship is (or, more precisely, what Union citizenship is not).

I will start by analysing the case law on incoming migration of non-economically active Union citizens. I will then turn to the Court’s approach to outward movement; and to citizens that, whilst not economically active, have some internal market ‘credentials’. I will conclude that the Court’s approach to justifications shapes Union citizenship to reinforce the allocation of welfare responsibilities along traditional lines, so that Union citizens are primarily the economic and social responsibility of their State of nationality, regardless of the actual links existing between citizen and state of residence and state of nationality.

#### II. Non-economic migration, the welfare state, and economic justifications

The interpretative tools developed in the context of the internal market, especially in relation to free movement rights – such as the notion of discrimination and the notion of obstacles – have been to a

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<sup>1</sup> See recently, Case C-628/11 *International Jet Management GmbH*, EU:C:2014:171, para 70; see also Case C-398/95 *SETTG*, EU:C:1997:282, para. 23, and Case C-20/09 *Commission v Portugal*, EU:C:2011:214, para. 65. See generally, the contribution to this volume by J Snell, ‘Economic Justifications and the Role of the State’.

certain extent transposed to the interpretation of Union citizenship.<sup>2</sup> Given the fact that an important part of the internal market relates to migration of individuals, this is not surprising: after all, the Court had always made clear that the free movement provisions pursued a social as well as an economic aim and should therefore be so interpreted. If the worker was not to be seen merely as a factor of production, so that she would gain extensive rights from a liberal interpretation of free movement rights,<sup>3</sup> and if the individual was protected also when simply seeking employment,<sup>4</sup> and to a certain degree when receiving economic services,<sup>5</sup> then the extension of interpretative tools developed in the context of the economic freedoms to cover movement of non-economic actors is perfectly understandable.

And yet, it hardly needs repeating, economic and non-economic integration are radically different, both in aims and in ambition. Economic integration is (or possibly was) premised on the benefits arising from movement of factors of production: ideally, migration would allow for a better allocation of skills and resources, so that migrants would move from regions with higher unemployment to those which could afford more work opportunities. Receiving countries would benefit not only by hosting a workforce that would fill labour or skill shortages,<sup>6</sup> but also because migration of those who are economically engaged has overall positive effects on the receiving country's economy. EU economic migrants might draw on host State welfare provision, but they also pay into it through general and ad hoc contribution. It is for this reason that economic justifications cannot be relied upon in the internal market: protectionism is to be eradicated, not encouraged. In this context, the purposive and generous interpretation of the free movement rights of economic actors is entirely consistent: there is a clear mandate in the Treaty; and there is a clear narrative that can be used to explain the benefits of economic migration (although that narrative is increasingly coming under strain).<sup>7</sup>

Not so in the case of non-economic migrants: there, we have no clear telos, and no clear narrative. On the one hand, the language of citizenship naturally resonates with state-like ideals of communities based on a sense of shared belonging, if not values; on the other hand, the Union sense of 'togetherness' is still, if existing at all, at a very incipient state.<sup>8</sup> Furthermore, Union citizenship almost crept in on the Member States; it would be naïve to think that in establishing

<sup>2</sup> See e.g. Case C-224/98 *D'Hoop v Office national de l'emploi* EU:C:2002:432; Case C-148/02 *Garcia Avello v Belgium*, EU:C:2003:539; Case C-406/04 *de Cuyper v Office National de l'Emploi*, EU:C:2006:491; Case C-

<sup>3</sup> See e.g. the extensive rights to equal treatment in relation to social and tax advantages, e.g. Case C-237/94 *O'Flynn v Adjudication Officer*, EU:C:1996:206; the derived rights of family members, including the derived right of the separated spouse who is the parent of a child in education in a host State (also when the EU worker has left the host territory), e.g. Case C-310/08 *London Borrow of Harrow v Ibrahim*, EU:C:2010:80, Case C-529/11 *Alarape and Tijani*, EU:C:2010:80; and the derived right of residence of family members of frontier workers in the home Member State, e.g. Case C-457/12 *S & G*, EU:C:2014:136.

<sup>4</sup> Case C-292/89 *Antonissen*, EU:C:1991:80.

<sup>5</sup> Case 286/82 *Luisi e Carbone v Ministero del Tesoro*, EU:C:1984:35.

<sup>6</sup> See the latest (2013) Eurostat statistics on intra-EU migration ([http://ec.europa.eu/eurostat/statistics-explained/index.php/File:Employed\\_persons\\_aged\\_15\\_and\\_older\\_taking\\_up\\_residence\\_in\\_an\\_EU\\_Member\\_State\\_other\\_than\\_their\\_countr\\_yof\\_citizenship\\_of\\_from\\_outside\\_the\\_EU\\_within\\_the\\_last\\_two\\_years\\_by\\_nationality\\_2011\\_and\\_2013\\_-\\_new.png](http://ec.europa.eu/eurostat/statistics-explained/index.php/File:Employed_persons_aged_15_and_older_taking_up_residence_in_an_EU_Member_State_other_than_their_countr_yof_citizenship_of_from_outside_the_EU_within_the_last_two_years_by_nationality_2011_and_2013_-_new.png)) and note an unsurprising direct link between the extent to which a country has been hit by the economic crisis and the extent to which it is a migration target (e.g. Italy -32.5%; Spain -47.8%; Germany +63.5%)

<sup>7</sup> See e.g. D Cameron (UK Prime Minister at the time), Letter to the *Financial Times*, 26 November 2013; on the same lines, Mr Cameron's letter to the *The Daily Telegraph*, 15 March 2014.

<sup>8</sup> It is sufficient here to recall the reactions to the economic problems in Greece and the Greek bailouts.

Union citizenship in the Maastricht Treaty the Member States were intending to establish a supranational welfare community. In fact, it is likely that most (if not all) Member States did not want to establish anything new at all.<sup>9</sup> It comes as no surprise then that the balance between belonging to a supranational community and national welfare states is one of the two fields, together with migration rights for third country national family members,<sup>10</sup> where the battle for citizenship is more strongly felt.

If, at the very beginning, Member States did not intend for Union citizenship to be innovative, or even to have direct effect, with the adoption of Directive 2004/38 they accepted that Union citizenship would change, at least to some extent, the relationship between economically inactive migrants and host Member States.<sup>11</sup> However, pursuant to the provisions of Directive 2004/38, membership of the host welfare community, and the consequent potential to make claims, is very limited: the economically inactive migrant shall not become a 'burden on the social assistance system' of the host State;<sup>12</sup> and the short term visitor shall not become an 'unreasonable burden'<sup>13</sup> on the social assistance system of the host State, so that during the first three months of residence Union citizens are not entitled, as a matter of Union law, to equal treatment in relation to social assistance,<sup>14</sup> though recourse to the latter cannot lead to automatic expulsion.<sup>15</sup> Similarly, workseekers can (in principle) be excluded from social assistance,<sup>16</sup> both in the first three months of residence and for the longer period of their stay when they continue looking for employment.<sup>17</sup>

Economic justifications, then, are at the very heart of the regime foreseen by Directive 2004/38 in relation to non-economically active migrants.<sup>18</sup> Member States are allowed to discriminate on grounds of nationality against non-economically active migrants in two instances: first of all, in relation to short term visitors by excluding them from social assistance tout court;<sup>19</sup> secondly, in relation to medium term visitors by making their residence rights conditional upon the fulfilment of

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<sup>9</sup> See e.g. the submissions of the Member States in Case C-184/99 *Grzelcyk v Centre public d'aide sociale d'Ottignies-Louvain-la-Neuve*, EU:C:2001:458 where, with the exception of Portugal, Member States argued against using Union Citizenship to grant meaningful rights to equal treatment.

<sup>10</sup> See e.g. the cases relating to third country national parents of Union citizens, e.g. Case C-413/99 *Baumbast and R v Secretary of State for the Home Department*, EU:C:2002:493, Case C-34/09 *Ruiz Zambrano v Office national de l'emploi (ONEm)*, EU:C:2011:124, Case C-256/11 *Dereci and others* EU:C:2011:734, Case C-86/12 *Alokpa v Ministre du Travail, de l'Emploi et de l'Immigration* EU:C:2013:645; and the cases relating to family members of own citizens, e.g. Case C-456/12 *O v Minister voor Immigratie, Integratie en Asiel and Minister voor Immigratie, Integratie en Asiel v B*, EU:C:2014:135.

<sup>11</sup> Directive 2004/38, on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States [2004] OJ L 158/77 (hereinafter Directive 2004/38).

<sup>12</sup> Directive 2004/38, Article 7(b).

<sup>13</sup> Directive 2004/38, Article 6(1).

<sup>14</sup> Directive 2004/38, Article 24(2).

<sup>15</sup> Directive 2004/38, Article 14(3).

<sup>16</sup> Although in this context, and as we shall see further below, social assistance has been interpreted narrowly; see Joined Cases C-22/08 and C-23/08 *Vatsouras and Koupatantze*, EU:C:2009:344.

<sup>17</sup> Directive 2004/38, Article 24(2).

<sup>18</sup> See e.g. Case C-140/12 *Brey*, EU:C:2013:565, para 55 (discussed in section V below). Directive 90/364 on a general right to residence [1990] OJ L180/26, Directive 90/365 on retired persons [1990] OJ L180/28, and Directive 93/96 on students [1993] OJ L317/59, precursors to Directive 2004/38, were also, and not surprisingly, preoccupied with the potential effects on the welfare systems of host States of economically inactive individuals, students and pensioners, and therefore also specified that such individuals should not become a burden on the social assistance system of the host States (see Art 1 of the relevant Directives).

<sup>19</sup> Article 24(2) Directive 2004/38.

economic requirements, in the form of a minimum income and comprehensive health insurance.<sup>20</sup> The reason why Member States can engage in such discriminatory treatment is to limit the economic burden arising from non-economic migration between Member States. Therefore, unlike in the case of economic free movement provisions, Member States *are* entitled to erect absolute barriers (no residency rights for those who do not possess sufficient resources and comprehensive health insurance) as well as discriminatory conditions (no access to social assistance to short-term migrants) *only* in order to protect their public finances.<sup>21</sup>

This said, whilst Directive 2004/38 sought to clarify the case law of the Court as it was at the time of drafting, in more recent times there has been a perceivable shift in the Court's interpretation.

In the first wave of cases, those rooted in the Treaty provisions, the Court was trying to define the rights of Union citizens, starting from the premise that the introduction of citizenship had been a game-changer in EU law, so that it was to be considered the 'fundamental status' of Union citizens.<sup>22</sup> In this first wave, much as it is the case in the free movement of economic actors, direct discrimination could not be saved by budgetary considerations alone, so that a Member State could not deny equal treatment to foreign citizens on the sole grounds that to allow membership of the welfare community to foreigners would be too expensive. As a result, and insofar as the Union citizen was lawfully resident by virtue of *either* national *or* EU law,<sup>23</sup> then she would be entitled to equal treatment, save for the possibility for Member States either to terminate residence on the grounds that the Union citizen no longer satisfied the requirements provided for in EU law;<sup>24</sup> or to justify *indirect discrimination* on grounds, which might have also been pursuing economic considerations, but which are not 'exclusively' economic in nature. Thus, the protection of the welfare state from *unwarranted* claims, whilst based on the banal assumption that welfare resources are limited, aims to determine who should be admitted to the circle of solidarity.<sup>25</sup> This is not the same as accepting an economic justification tout court. Rather, it is premised on the idea that welfare societies are based on links of belonging which might be presumed for certain individuals (e.g. nationals); and might be acquired by others (through contribution to the economic life of the host State;<sup>26</sup> or simply by virtue of the passage of time/contribution to the host society).

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<sup>20</sup> Article 7(1) (b) and (c) Directive 2004/38; pursuant to Article 8(4) Directive 2004/38, Member States are not allowed to lay down a minimum amount that they regard as 'sufficient resources', rather having to take into account the personal situation of the claimant.

<sup>21</sup> See *Brey*, footnote 18.

<sup>22</sup> Case C-184/99 *Grzelcyck v Centre public d'aide sociale d'Ottignies-Louvain-la-Neuve*, EU:C:2001:458, para. 31.

<sup>23</sup> Case C-85/96 *Martínez Sala v Freie Stadt Bayern*, EU:C:1998:217; Case C-184/99 *Grzelcyck v Centre public d'aide sociale d'Ottignies-Louvain-la-Neuve*, EU:C:2001:458.

<sup>24</sup> Case C-184/99 *Grzelcyck v Centre public d'aide sociale d'Ottignies-Louvain-la-Neuve*, EU:C:2001:458; Case C-456/02 *Trojani v Centre public d'aide sociale de Bruxelles*, EU:C:2004:488.

<sup>25</sup> E.g. Case C-224/98 *D'Hoop v Office national de l'emploi* EU:C:2002:432; Case C-209/03 *Bidar v London Borough of Ealing and Secretary of State for Education and Skills*, EU:C:2005:169; Case C-138/02 *Collins v Secretary of State for Work and Pensions*, EU:C:2013:860.

<sup>26</sup> See recently, Case C-20/12 *Giersch and others v Luxembourg*, EU:C:2013:411, para 63: 'In that regard, it should be noted that the Court has already held that migrant and frontier workers, since they have participated in the labour market of a Member State, have in principle created a sufficient link of integration with the society of that State, allowing them to benefit from the principle of equal treatment, as compared, respectively with national workers and resident workers. The link of integration arises, in particular, from the fact that, through the taxes which they pay in the host Member State by virtue of their employment there, migrant and frontier workers also contribute to the financing of the social policies of that State'.

Thus, in this phase of development of Union citizenship, budgetary considerations are relevant only insofar as they allow Member States to limit the class of claimants to those who have established a meaningful 'link' with the host welfare society.<sup>27</sup>

Furthermore, the rights in secondary legislation were seen as merely complementing/detailing the rights granted by the Treaty: hence, the limitations and conditions provided for therein had to be interpreted in accordance with the general principles of Union law, and particularly the principle of proportionality.<sup>28</sup>

Thus, for instance, in *Martínez Sala*, a case that would arguably be decided in a very different way nowadays, the Court explicitly held that since the discrimination at issue was direct, it could not be justified.<sup>29</sup> In *Grzelcyk* the Court, whilst accepting that an excessive burden on the welfare resources of the host State might be a reason to terminate the residency rights of an economically inactive Union citizen, also clarified that the residency directives<sup>30</sup> (precursors to Directive 2004/38) had 'accepted a certain degree of *financial solidarity* between nationals of a host Member State and nationals of other Member States, particularly if the difficulties which a beneficiary of the right of residence encounters are temporary'.<sup>31</sup> In *Baumbast*,<sup>32</sup> having found that Article 21(1) TFEU was directly effective, the Court proceeded to assess whether Mr Baumbast could be denied a residence permit because he did not possess emergency health insurance so that his insurance cover was not 'comprehensive'.<sup>33</sup> Here the Court accepted that the rights conferred by the Treaty could be limited to avoid an 'unreasonable burden on the *public finances* of the Member States',<sup>34</sup> and yet, by requiring a personal assessment, one based on the particular situation of *that particular* claimant, the Court excluded the absolute relevance of *mere* budgetary considerations in determining the rights of Union citizens: rather a balancing act will be required to determine whether the burden on public finances imposed by the claimant is reasonable or not. In turn, whether the burden is reasonable or not will depend on non-economic criteria, such as the personal circumstances of the claimant, her family ties, her link with the host society and so on.

In *Bidar*, the Court examined the extent to which a lawfully resident Union citizen could rely on the Treaty in order to obtain a maintenance loan for his studies; here the United Kingdom, whose rules were under attack, attempted to rely on two grounds of justification. First of all, it was legitimate to ensure that 'the contribution made by parents or students through taxation is or will be sufficient to

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<sup>27</sup> On the rather nebulous notion of 'real link', see e.g. C O'Brien 'Real links, abstract rights and false alarms: the relationship between the ECJ's case law and national solidarity' (2008) 33 ELRev 643; PJ Neuvonen 'In search of (even) more substance for the 'real link' test: comment on *Prinz and Seeberger*' (2014) 39 ELRev 125.

<sup>28</sup> See e.g. Case C-413/99 *Baumbast and R v Secretary of State for the Home Department*, EU:C:2002:493, and Case C-408/03 *Commission and Belgium* (sufficient resources), EU:C:2006:192, para 39.

<sup>29</sup> Case C-85/96 *Martínez Sala v Freie Stadt Bayern*, EU:C:1998:217, para. 64.

<sup>30</sup> Directive 90/364 on a general right to residence [1990] OJ L180/26; Directive 90/365 on retired persons [1990] OJ L180/28; Directive 93/96 on students [1993] OJ L317/59.

<sup>31</sup> Case C-184/99 *Grzelcyk v Centre public d'aide sociale d'Ottignies-Louvain-la-Neuve*, EU:C:2001:458, para. 44 (emphasis added).

<sup>32</sup> Case C-413/99 *Baumbast and R v Secretary of State for the Home Department*, EU:C:2002:493.

<sup>33</sup> Although it is not clear whether Mr Baumbast was not in fact covered by the provisions of then Regulation 1408/71, see para. 89 of the ruling.

<sup>34</sup> Case C-413/99 *Baumbast and R v Secretary of State for the Home Department*, EU:C:2002:493, para. 90 (emphasis added).

justify the provision of subsidised loans.<sup>35</sup> Secondly, it was argued, '[i]t is also legitimate to require a genuine link between the student claiming assistance to cover his maintenance costs and the employment market of the host Member State'.<sup>36</sup> It is then interesting to note that the Court ignored the first issue, of a purely budgetary nature, to focus exclusively on the need to ensure the existence of a genuine link between claimant and host State: only the existence of said genuine link would justify that degree of financial solidarity mentioned in *Grzelcyck*. Again, the Court found that a single rule which excluded the possibility for a student who had resided in the UK for a significant time and had undergone a part of his secondary education there, to demonstrate such link was incompatible with the Treaty. Furthermore, the Court refused the request, put forward by the UK, Austria and Germany, to limit the temporal effects of the ruling, thus pointing at the fact that even the cumulative effect of such claims would not be a reason good enough to limit the rights of Union citizens who had established a real link with the host State to receive support for their university education. In *Trojani*, the Court clarified again that once the Union citizen was lawfully resident in the host State, despite not fulfilling the criteria listed in the residency directives, he was entitled to equal treatment in relation to social assistance so that the only course open to the host State would be that of terminating the right to reside (subject to the principles of Union law, including and especially that of proportionality).<sup>37</sup>

Directive 2004/38, by not excluding medium term residents from the scope of the principle of equal treatment, then codifies this case law: whilst it can be taken for granted that stays of three months or below are not sufficient to establish a link with the host community that justifies access to social assistance, that is not the case for economically inactive individuals residing for a longer period pursuant to Article 7(1)(b) of Directive 2004/38. The budgetary considerations in relation to access to host welfare states are resolved, similarly to the case law of the Court, by virtue of the conditional rights of residence of those migrants who do not engage, and do not wish to engage, in an economic activity. It is the comprehensive health insurance/sufficient resources criteria that act as a break for benefit tourism; not a variation of the principles informing equal treatment between national and non-nationals in EU law.

In a second wave of case law, that immediately following the adoption of Directive 2004/38, this approach is broadly speaking maintained, although the Court accepts the further limitation imposed by Article 24(2) of Directive 2004/38 to the effect that economically inactive migrant students can legitimately be excluded from maintenance grants and other subsidies for higher education awarded by the host State until such time as they have established a genuine link with the host society. A requirement of five years residency before being eligible for any form of maintenance grant for studies, consistently with Article 24(2) of Directive 2004/38, is seen as a reasonable way to ensure the existence of such a link.<sup>38</sup> In relation to workseekers, the Court seemingly departed from the compromise espoused in the Directive to restate the centrality of a purposive interpretation of the free movement provisions, so that benefits which seek to aid the individual gain access to the

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<sup>35</sup> Case C-209/03 *Bidar v London Borough of Ealing and Secretary of State for Education and Skills*, EU:C:2005:169, para 55.

<sup>36</sup> Case C-209/03 *Bidar v London Borough of Ealing and Secretary of State for Education and Skills*, EU:C:2005:169, para 55.

<sup>37</sup> Case C-456/02 *Trojani v Centre public d'aide sociale de Bruxelles*, EU:C:2004:488.

<sup>38</sup> Case C-158/07 *Förster*, EU:C:2008:630.

employment market are not to be considered 'social assistance' for the purposes of Article 24(2) and are therefore also available to migrant workseekers.<sup>39</sup>

In a third wave of case law, the Court's interpretation shifts so as to adopt a more rigid approach: those who do not derive the right to reside from Directive 2004/38 cannot rely on Article 24(1) of the Directive. More importantly though, the rights detailed in the Directive cannot be supplemented by the rights conferred in the Treaty: rather, at least in relation to the relationship between economically inactive migrants and the host State, the Directive becomes the floor and the ceiling of the rights granted by Union law.<sup>40</sup> It is to this more recent case law that we shall now turn our attention.

### III. The more recent case law of the Court: economic justifications and allocation of responsibilities between Member States

We have mentioned above that the Court's case law evolves (and regresses) over time. The first and most notable change in the case law relates to the relevance of Articles 21 and 18 TFEU when assessing the rights of Union citizens who reside or seek to reside in another Member State: in the first instance, and as mentioned above, the residence directives were seen as a limitation to Treaty rights which therefore needed to be interpreted pursuant to the principles of necessity and proportionality. This was partially due to the fact that the secondary legislation applicable predated the introduction of Union citizenship; the Court therefore felt empowered to reinterpret the residency directives in the light of the Treaty changes.<sup>41</sup> As a result of the primacy of the Treaty rights over the pre-existing secondary legislation, a migrant fell within the scope *ratione personae* of the Treaty even when she did not satisfy (all of) the conditions contained in secondary legislation;<sup>42</sup> or when she was residing in the host State pursuant to national law rather than the Directive.<sup>43</sup> In this first phase, then, the traditional scheme regarding justifications pursuing also an economic aim is maintained: economically inactive citizens derive their rights from the Treaty, and as a result limitations to their rights must be justified. The need to preserve the welfare system is at this stage considered a mixed economic/social objective, so that the mere aim to avoid welfare claims by non-nationals is insufficient to deny rights to Union citizens. Furthermore, and because the Union

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<sup>39</sup> It is to be seen how the Court will reconcile the narrow interpretation given to 'social assistance' in Joined Cases C-22/08 and C-23/08 *Vatsouras and Koupatantze*, EU:C:2009:344, to the broad interpretation given in Case C-333/13 *Dano*, EU:C:2014:2358, para 63, where the Court defined 'social assistance' for the purposes of Article 24(2) Directive 2004/38 as 'all assistance schemes established by the public authorities, whether at national, regional or local level, to which recourse might be had by an individual who does not have resources sufficient to meet his own basic needs and those of his family and who by reason of that fact, may, during his period of residence, become a burden on the public finances of the host Member State which would have consequences for the overall level of assistance which may be granted by that State'. On these issues, see also AG Wathelet's Opinion in Case C-67/14 *Alimanovic* EU:C:2015:210, case still pending at the time of writing.

<sup>40</sup> And, in fact, stays which are not in pursuance to Directive 2004/38 seem to exclude the claimant from the scope of application of EU law (regardless of article 21 TFEU); see e.g. Case C-333/13 *Dano*, EU:C:2014:2358, and also the exclusion of the relevance of the Charter of Fundamental Rights in that case. On the 'new' relationship between primary and secondary law see P Syrpis 'The relationship between primary and secondary law in the EU' (2015) 52 C.M.L. Rev. 461.

<sup>41</sup> Directive 90/364 on a general right to residence [1990] O.J. L180/26; Directive 90/365 on retired persons [1990] O.J. L180/28; Directive 93/96 on students [1993] O.J. L317/59.

<sup>42</sup> E.g. Case C-413/99 *Baumbast and R v Secretary of State for the Home Department*, EU:C:2002:493.

<sup>43</sup> Case C-85/96 *Martínez Sala v Freie Stadt Bayern*, EU:C:1998:217; Case C-224/98 *D'Hoop v Office national de l'emploi* EU:C:2002:432; Case C-456/02 *Trojani v Centre public d'aide sociale de Bruxelles*, EU:C:2004:488.



citizen's claim rests directly on the Treaty, the justification must in any case be interpreted in a proportionate way, which means taking into account the citizen's factual circumstances.

This is no longer true in more recent case law: the rights of economically inactive Union citizens are now (primarily) those conferred by Directive 2004/38,<sup>44</sup> and are limited accordingly. Thus, residence pursuant to national law becomes immaterial to the enjoyment of rights conferred not only by the Directive,<sup>45</sup> but also to the right of equal treatment granted by Article 18 TFEU.<sup>46</sup> The 'limitations and conditions' contained in Directive 2004/38, primarily the sufficient resources/comprehensive health insurance requirements, no longer need to be interpreted having regard to the principle of proportionality; and a migrant who does not satisfy the criteria of sufficient resources/comprehensive health insurance required by Directive 2004/38 falls, for that reason, outside the scope of Union law.<sup>47</sup> This is the case even when she is residing in the host State lawfully pursuant to national law.<sup>48</sup>

Thus, for instance, in the case of *Alokpa*,<sup>49</sup> the claimant was the Togolese mother of two minor French citizens residing in Luxembourg. Ms Alokpa applied for a residence permit and a work permit as the mother of Union citizens: she had already secured a job that would allow her to provide for her children and hence satisfy the requirements of Directive 2004/38. However, lacking a work permit, which in turn depended on her residence status, she could not take up the job offer, and was therefore left without resources. The Court found that, lacking resources, Ms Alokpa could not derive residency rights from her children, despite the fact that she had arguably formed a real link with the host society since she had resided there for over three years and her children, who had been born severely premature in Luxembourg, had been cared for in that State. In this case, the Treaty provisions were not used to supplement Ms Alokpa's rights and, as a result, Luxembourg – the host Member State – did not need to justify the denial of residency rights.

Similarly, in *Dano*, we see a shift in relation to the 'origin' of the resources relevant in order to satisfy Article 7(1)(b) of Directive 2004/38.<sup>50</sup> In this case, the claimant was a Romanian national living with her sister in Germany; her sister provided for both Ms Dano and her child, who had been born in Germany. When Ms Dano applied for a benefit, she was denied it on the grounds that she was not 'lawfully resident' for the purposes of Union law, although she was lawfully present pursuant to

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<sup>44</sup> The Treaty provisions remain relevant when Directive 2004/38 does not apply, especially in relation to claims brought by Union citizens against their Member State of nationality; this said, the Court has indicated that in those instances Directive 2004/38 applies, *mutatis mutanda*, by analogy; see Case C-456/12 *O. and B.*, EU:C:2014:135, annotated by Spaventa 'Family rights for circular migrants and frontier workers: *O. & B. and S. & G.i*' (2015) 52:3 CMLRev 753.

<sup>45</sup> For instance, the cases relating to which 'residence' is relevant in order to establish the five years of lawful and continuous residence required for permanent residence; e.g. Joined Cases C-424 and 425/10 *Ziolkowski and Szeja*, EU:C:2011:866.

<sup>46</sup> Rights to permanent residence; and see also, Case C-456/12 *O. and B.*, EU:C:2014:135.

<sup>47</sup> For a positive assessment of this development, in terms of democratic legitimacy of legislation vis-à-vis Treaty interpretation see P Syrpis 'The relationship between primary and secondary law in the EU' (2015) 52 C.M.L. Rev. 461.

<sup>48</sup> See e.g. Case C-333/13 *Dano*, EU:C:2014:2358 and the exclusion of the relevance of the Charter therein.

<sup>49</sup> Case C-86/12 *Alokpa v Ministre du Travail, de l'Emploi et de l'Immigration* EU:C:2013:645.

<sup>50</sup> Case C-333/13 *Dano*, EU:C:2014:2358; the ruling in *Dano* has already given grounds to a fertile academic debate; see e.g. H Verschueren 'Preventing 'benefit tourism' in the EU: a narrow or broad interpretation of the possibilities offered by the ECJ in *Dano*?' (2015) 52 CML Rev 363; D Thym 'The elusive limits of solidarity: residence rights of and social benefits for economically inactive Union Citizens' (2015) 52 CML Rev 17.

national law.<sup>51</sup> The Court then had to clarify the extent to which Ms Dano could rely on either Article 18 TFEU (general principle of equal treatment) or on Article 24 of Directive 2004/38 in order to claim access to the benefit in question. The Court held that the general equal treatment right was given specific expression in Article 24(1) of the Directive. As a result, this was the only equal treatment provision that was found to be relevant. Further, given that Article 24 only applies to those resident pursuant to the Directive, the Court assessed whether Ms Dano satisfied the conditions contained therein and, in particular, the 'sufficient resources' condition.

In this respect, it might be useful to recall that in *Chen*, the Court accepted that, in order to comply with the sufficient resources criterion, it was enough for the citizen 'to have' sufficient resources, regardless of the origin of such resources.<sup>52</sup> As a result, the sufficient resources requirement was satisfied also when the funds were not the citizen's own, rather being provided by a family member. In *Commission v Belgium*, the Grand Chamber went a step further:<sup>53</sup> funds could be provided also by a third party who was not (legally speaking) a family member of the Union citizen. Faced with the objection that the support granted by a third party not having a legal link with the Union citizen might increase the risk of such resources being withdrawn, so that the Union citizen might become a burden on the social assistance system of the host State, the Court found that such a risk was inherent in the possibility of circumstances changing, regardless of the source of the income. In *Dano*, however, the Court focuses exclusively on the resources of the claimant: the fact that Ms Dano was hosted by her sister, who provided for Ms Dano and her son 'materially' (including lodging), was not taken into any consideration by the Court in assessing whether Ms Dano had sufficient resources pursuant to Directive 2004/38. As a result, Germany found itself exempted from providing any justification in relation to its rules: Article 18 TFEU was declared irrelevant; and Article 24(1) of Directive 2004/38 did not apply since Ms Dano did not fall within the personal scope of the Directive.

Leaving aside any more critical assessment of this case law, and of its compatibility with the hierarchy of sources as elaborated by the Court in a consistent jurisprudence,<sup>54</sup> this shift in interpretation also has repercussions for our reflection on economic justifications. The Court's new approach means that if, before, secondary legislation provided the floor of the rights conferred by Union law and the Treaty provided the ceiling, now Directive 2004/38, in most cases,<sup>55</sup> exhausts the rights conferred on non-economically active migrants. In this way, the Directive has become the floor *and* the ceiling of rights conferred by Union law. As a result, a national rule which is consistent with the Directive is consistent with Union law, and the necessity and proportionality assessment no longer plays a role. This is crucial given that, as said above, the rights of movement of economically inactive migrants are limited primarily by the desire to protect the welfare state from claims by those extraneous to the welfare community. While the Treaty provisions remained the main focus, it was open to the Union citizen to argue that she was in fact part of *that* welfare community.

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<sup>51</sup> On this aspect see D Thym 'When Union Citizens turn into illegal migrants: the Dano case' (2015) 40 ELRev 249.

<sup>52</sup> Case C-200/02 *Chen*, EU:C:2004:639.

<sup>53</sup> Case C-408/03 *Commission and Belgium* (sufficient resources), EU:C:2006:192.

<sup>54</sup> On this issue, see N Nic Shuibhne 'Limits rising, duties ascending: the changing legal shape of Union citizenship' (2015) 52:4 CMLRev.

<sup>55</sup> The Treaty provisions are still relevant when the Directive does not apply, such as in the case of challenges to rules imposed by the Member State of nationality to outward and circular migration, although in the latter case the Directive applies by 'analogy'. See footnote 43 above.

Furthermore, it was for the Member State to prove that satisfying that claim would transform the claimant into an ‘unreasonable burden’, not necessarily an easy task given that a single claim will never have any effect on the welfare budget of the host State; and that the effect of cumulative claims is almost impossible to assess,<sup>56</sup> not least since there seems to be a paucity of relevant statistical data. Similarly, a defence based on the threat of welfare tourism is also difficult to sustain given that there is little if any evidence that welfare tourism is a motive for migration.<sup>57</sup>

The shift from Treaty assessment to a straightforward application of Directive 2004/38 therefore allows the ‘economic justification’ to be internalised: the assessment made by the legislature as to the risks to national welfare communities from the migration of economically inactive people has been accepted by the Court, which no longer requests from the Member States an ad hoc assessment of the impact of the single claim on the welfare state. Here, just compare the earlier case of *Martínez Sala* – a claimant lawfully resident in Germany by virtue of national law and entitled to full equal treatment in relation to benefits<sup>58</sup> – to the above mentioned, and more recent, case of *Dano* – a claimant lawfully present in Germany but somehow excluded from the protection of both Treaty and Directive.

Furthermore, and given the lack of any statistical information, it should be queried whether the need to protect the welfare resources of the host State is the only drive behind Directive 2004/38. In other words, it could be argued that the Directive, as recently interpreted by the Court, is as much about protecting unwarranted claims as it is about apportioning the allocation of welfare responsibilities in a more integrated EU. And that allocation is made along traditional national citizenship lines: it is the state of nationality that bears primary responsibility for the welfare claims of non-economically active individuals in need of support.<sup>59</sup> This is the case even for those citizens who have established genuine links with the host society, for instance, by having resided there for a long time.<sup>60</sup> Unless those individuals have also satisfied the conditions provided for in the Directive (inextricably linked to wealth),<sup>61</sup> then they continue to be excluded from the host welfare society.<sup>62</sup>

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<sup>56</sup> In Case C-140/12 *Pensionsversicherungsanstalt v Brey*, EU:C:2013:565, the Court held that in order to ascertain the burden on the national social assistance system of granting a benefit to a pensioner ‘it may be relevant (...) to determine the proportion of the beneficiaries of that benefit who are Union citizens in receipt of a retirement pension in another Member State’ (para 78).

<sup>57</sup> See *A fact finding analysis on the impact on the Member States' social security systems of the entitlements of non-active intra-EU migrants to special non-contributory cash benefits and healthcare granted on the basis of residence* Report prepared on behalf of DG Employment Social Affairs and Inclusion via DG Justice Framework Contract (14 October 2013, revised 16 December 2013).

<sup>58</sup> Case C-85/96 *Martínez Sala v Freie Stadt Bayern*, EU:C:1998:217; see also Case C-456/02 *Trojani v Centre public d'aide sociale de Bruxelles*, EU:C:2004:488.

<sup>59</sup> On these issues see further E Spaventa ‘Earned Citizenship – Understanding Union Citizenship Through its Scope’ in D Kochenov *Citizenship and Federalism in the European Union: the Role of Rights* (CUP 2015, forthcoming).

<sup>60</sup> And the case law on the public policy/security derogations seems to point at the continued responsibility of the State of nationality for the misbehaviour of their citizens, even when the latter have spent most of their lives in another Member State. See e.g. Case C-145/09 *Tsakouridis*, EU:C:2010:708; Case C-348/09 *PI* EU:C:2012:300; on the idea of a ‘qualitative’ element to integration, see Case C-378/12 *Onuekwere v Secretary of State for the Home Department*, EU:C:2014:13; Case C-400/12 *M.G.*, EU:C:2014:9. On these issues, see E Spaventa ‘Once a foreigner always a foreigner: who does not belong here anymore? Expulsion Measures’ in H Verschueren *Where do I belong?* (Intersentia, forthcoming 2016).

<sup>61</sup> S de Mars ‘Economically inactive EU migrants and the United Kingdom's National Health Service: unreasonable burdens without real links?’ (2014) 39 *ELRev* 770, analysing the Commission’s claim that the

#### IV. The Member State of nationality and its responsibilities

The fact that more recent Union citizenship cases simply reinforce the allocation of responsibility of the Union citizen to the welfare community of origin is shown also, and possibly especially, by the case law concerning the responsibilities of the Member State of nationality. Here, the full force of the traditional *modus interpretandi* of the Court results in the non-economic migrant being able to challenge restrictions to their right to movement even when budgetary considerations might be paramount. In other words, whilst the Court accepts that it is legitimate for Member States to require that the (migrant) claimant continues to have a real link with the welfare community of origin, the mere desire to reduce the welfare bill is not sufficient to justify a barrier to movement of the economically inactive citizen. Hence, in this context, economic justifications are again not permitted: the link of belonging to the welfare community is not severed by absence from the national territory. For instance, in *Stewart*,<sup>63</sup> a young person with Down's syndrome made a claim for incapacity benefits; however, the claim was refused on the ground that Ms Stewart was not present in the UK, and had not been so for at least 26 weeks in the 52 weeks immediately prior to the claim. The Stewart family had in fact been living in Spain for more than 10 years, albeit the father had worked in the United Kingdom during that time; moreover, Ms Stewart had been able to receive disability living allowance from the UK whilst living in Spain.

The Court found, *inter alia*, that the minimum presence requirement was a barrier to Ms Stewart's right to move, in that it might naturally deter her from moving abroad. The UK claimed that the rules were justified on two grounds: first of all, in order to ensure that there is a genuine link between claimant and Member State; and, second, to guarantee the financial balance of the national social security system. The Court found both aims to be, in theory, compatible with the Treaty: yet, the legislation was incompatible with EU law insofar as it did not allow the claimant to prove a 'real link' with the UK welfare community in ways alternative to past presence. The Court then gave instructions as to the elements which might be relevant to such an assessment: Ms Stewart was already receiving disability living allowance and national insurance contributions were credited to her account in the UK; her parents were both in receipt of retirement pensions from the UK and her father had worked there; and Ms Stewart had been born and had spent a significant part of her life in the UK. The Court then found that the same considerations also applied in relation to the aim to guarantee the financial balance of the national social security system; and it concluded that 'the necessity of establishing a genuine and sufficient connection between the claimant and the

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NHS, the UK National Health System, which is free at the point of use, satisfies the condition of comprehensive health insurance. Thus, economically inactive migrants coming to the UK would only have to possess sufficient resources in order to obtain a residence permit.

<sup>62</sup>Furthermore, the Court has superimposed on the Directive some qualitative criteria in order to be able to benefit from the enhanced protection deriving from having stayed for a considerable time in the host State; see Case C-378/12 *Onuekwere v Secretary of State for the Home Department*, EU:C:2014:13; Case C-400/12 *Secretary of State for the Home Department v M.G.*, EU:C:2014:13. The Court has also given a very broad interpretation of the 'imperative grounds of public security' which pursuant to Article 28(3) Directive 2004/38 are the only grounds that can justify the expulsion of a Union citizen who has resided in the host State for more than 10 years, see Case C-348/09 *P.I.*, EU:C:2012:300. On 'imperative grounds of public security', see also the chapter by Koutrakos in this volume.

<sup>63</sup>Case C-503/09 *Stewart v Secretary of State for Work and Pensions*, EU:C:2011:500.

competent Member State enables that State to *satisfy itself that the economic cost of paying the benefit at issue in the main proceedings does not become unreasonable*'.<sup>64</sup>

This notion of continued responsibility of the State of origin is visible also in other strands of the case law. In the above mentioned case of *Alokpa*,<sup>65</sup> the Court also relied on the fact that Ms Alokpa could have gone to France, the state of nationality of her children, where she would have (probably) enjoyed a derived right of residence.<sup>66</sup> This was the case even though neither Ms Alokpa nor her children had any emotional or actual link with that Member State. It is the Member State of nationality which therefore bears primary responsibility for its nationals.

Similarly, in relation to students wishing to go and study in another Member State, the Court has been generous in finding that Member States may not impose criteria for eligibility for financial support for studies abroad which are indirectly discriminatory<sup>67</sup> or unduly penalise those who have taken advantage of their free movement rights.<sup>68</sup> In these cases, the Court falls just short of admitting that, in most cases, the real link between awarding-state and beneficiary will be satisfied by the latter possessing the nationality of the former. For instance, in the *Thiele Meneses* case,<sup>69</sup> the issue related to a permanent residence condition required in order to be able to export an education grant to another Member State. The claimant in that case had never resided in Germany, even though he possessed German nationality and had moved there only for the purposes of tertiary education. After six months, he decided to transfer his degree to the Netherlands and applied for an education grant, which was denied since he resided in Turkey rather than Germany as required by the relevant rules. The Court found that the rules at issue constituted a barrier to movement since they were likely to discourage students from exercising their right to move and study in another Member State. In examining the justification issue, the Court of Justice stated:

The Court has recognised that it may be legitimate for a Member State, in order to ensure that the grant of assistance to cover the maintenance costs of students from other Member States does not become an unreasonable burden which could have consequences for the overall level of assistance which may be granted by that State, to grant such assistance only to students who have demonstrated a certain degree of integration into the society of that State, and *if a risk exists of such an unreasonable burden, theoretically*, similar considerations may apply as regards the award by a Member State of education or training grants to students wishing to study in other Member States (...).<sup>70</sup>

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<sup>64</sup> Case C-503/09 *Stewart v Secretary of State for Work and Pensions*, EU:C:2011:500, para. 103 (emphasis added).

<sup>65</sup> Case C-86/12 *Alokpa v Ministre du Travail, de l'Emploi et de l'Immigration* EU:C:2013:645.

<sup>66</sup> In France she would be presumably be protected (through her children's right to stay in the territory of the EU) by EU law, see Case C-34/09 *Ruiz Zambrano* EU:C:2011:124. The result is rather bizarre since even though EU law theoretically does not apply to purely internal situation, the Alokpa family would be protected when static but not when migrating.

<sup>67</sup> See e.g. Case C-275/12 *Elrick v Bezirksregierung Köln*, EU:C:2013:684; Joined Cases C-11/06 and 12/06 *Morgan and Bucher*, EU:C:2007:626.

<sup>68</sup> E.g. Case C-359/13 *Martens v Minister van Onderwijs, Cultuur en Wetenschap*, EU:C:2014:2240.

<sup>69</sup> E.g. Joined Cases C-523/11 and 585/11 *Prinz and Seeberger*, EU:C:2013:524; Case C-220/12 *Thiele Meneses v Region Hannover*, EU:C:2013:683.

<sup>70</sup> Case C-220/12 *Thiele Meneses v Region Hannover*, EU:C:2013:683, para. 35 (emphasis added).

It is therefore much more difficult for the Member State of nationality to rely on economic considerations in order to justify a restriction on the free movement rights of economically inactive citizens than it is for the host State.

#### V. Access to welfare benefits: the economic link and the sense of belonging

If economically inactive citizens remain the responsibility of their Member State of origin, so that host Member States are able to erect barriers to access to the host welfare society which are justified on economic grounds, whilst Member States of nationality are prevented from hindering movement through measures intended to reduce the overall welfare bill, the situation is very different in relation to those migrants who establish an economic link. In this respect, the link with a past, present or future economic activity allows the individual mobility also across welfare societies (at least to a certain extent), although the weaker the link with the economic activity the easier it is for the Member State to justify restricting welfare entitlement.

In this respect, it is useful to recall the situation of work-seekers. It is well known that to start with, and pre-citizenship, work-seekers benefited from a semi-status in European law; thus an individual in search of a job was free to move to any of the Member States and stay there for a 'reasonable' time or until that time in which she continued to look for a job and had 'genuine chances' of being engaged.<sup>71</sup> However, the work-seeker was excluded from the right of equal treatment in relation to social and tax advantages since Article 7(2) Regulation of 1612/68 applied only to workers.<sup>72</sup> Post-citizenship, in the case of *Collins*,<sup>73</sup> the Court modified its case law. Given that, pursuant to the case law, non-economically active citizens benefited from the right to equal treatment, the Court held that work-seekers fell now within the scope of Article 45(2) TFEU to the extent that they enjoyed a right to equal treatment also in relation to those benefits intended to facilitate access to the employment market. It is, of course, open to Member States to require that there exists a genuine link between claimant and host employment market,<sup>74</sup> since it is this link that justifies a claim upon the host welfare community.

In *Vatsouras*,<sup>75</sup> the Court restated, in relation to work-seekers, the primacy of the Treaty over the provisions of Directive 2004/38: asked to rule as to the compatibility with the Treaty free movement of workers' rules of Article 24(2) of the Directive, which authorises Member States not to confer social assistance on short term residents and work-seekers, the Court restated that Article 45(2) TFEU granted to work-seekers a right to equal treatment in relation to benefits aimed at facilitating access to the host State employment market. The direct conflict with the provisions of the Directive was avoided by applying a narrow interpretation of 'social assistance' to exclude such benefits from its scope.<sup>76</sup>

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<sup>71</sup> Case C-292/89 *Antonissen* EU:C:1991:80, para. 21, and Case C-344/95 *Commission v Belgium* [1997] ECR I-1035, para. 17.

<sup>72</sup> E.g. Case 316/85 *Lebon* EU:C:1987:302.

<sup>73</sup> Case C-138/02 *Collins v Secretary of State for Work and Pensions*, EU:C:2013:860.

<sup>74</sup> And such link might arise even just from personal circumstances, such as marriage; see e.g. Case C-367/11 *D Prete v Office national de l'emploi*, EU:C:2012:668.

<sup>75</sup> Joined Cases C-22/08 and C-23/08 *Vatsouras and Koupatantze*, EU:C:2009:344.

<sup>76</sup> For a further development, see AG Wathelet's Opinion in Case 67/14 *Alimanovic* EU:C:2015:210, case still pending at the time of writing.

In the context of Union citizens looking for employment, then, the Court bases its rulings not on Directive 2004/38, as it does for economically inactive citizens, but directly on the Treaty provisions on the free movement of workers. As a result, rules limiting access to certain benefits can be closely scrutinised, not only as to their justifications *but especially* as to their proportionality and necessity. Here, the Court's mode of reasoning is the same as that which characterised the earlier case law on Union citizenship, so that the particular circumstances of the case remain relevant in determining eligibility for the benefit facilitating access to the labour market in so far as the link with the host employment market can be proven in a variety of ways, including through entirely personal circumstances such as marriage.<sup>77</sup>

And it is not only work-seekers that are privileged; anyone who might establish internal market credentials is likely to benefit from a facilitated access to the host welfare community. Thus, for instance, in the case of *N.*,<sup>78</sup> the Court restated that the reasons why a Union citizen takes up employment are immaterial to her gaining the rights conferred by Treaty or secondary legislation, as the case might be. Article 24(2) of Directive 2004/38 excludes a duty to ensure equal treatment in relation to maintenance grants for migrant students who have yet to gain the right to permanent residency. However, once an individual has triggered one of the economic free movement provisions, and even when she has done so for the sole purpose of gaining eligibility to maintenance grants,<sup>79</sup> she benefits from the full right to equal treatment. Similarly, in *Giersch*,<sup>80</sup> the Court was asked to determine the compatibility with the free movement of workers (specifically, Article 45 TFEU and Article 7(2) of Regulation 1612/68) of a residence requirement for eligibility to a study grant. The claimants were children of frontier workers employed in Luxembourg who were denied a study grant on the grounds of residence. The economic implications of the case were considerable since, at the time of referral, there were another 600 cases pending in front of the national court on the same issue just for the 2010/11 year. In examining whether the residence requirement, undoubtedly indirectly discriminatory, was justified, the Court of Justice explicitly excluded the possibility of relying on budgetary considerations; it held:

As regards the justification based on the additional burden which would result from non-application of the residence requirement, it should be borne in mind that, although budgetary considerations may underlie a Member State's choice of social policy and influence the nature or scope of the social protection measures which it wishes to adopt, *they do not in themselves constitute an aim pursued by that policy* and cannot therefore justify discrimination against migrant workers.<sup>81</sup>

The Court then found that the aim of increasing the percentage of resident population with a higher education degree was a legitimate objective and that whilst, in principle, a residence requirement was appropriate to achieve that aim, its blanket application, especially to the claimants in the case at issue, was disproportionate. Again, then, when there is a link with the internal market the Court is

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<sup>77</sup> See *mutatis mutandis* Case C-367/11 *Prete*, ECLI:EU:C:2012:668.

<sup>78</sup> Case C-46/12 *N. v. Styrelsen for Videregående Uddannelser og Uddannelsesstøtte*, EU:C:2013:97, esp. para. 47.

<sup>79</sup> And cf with *Dano*, where the Court held that Member States must maintain the right to refuse social benefits to economically inactive citizens that move 'solely in order to obtain another Member State's social assistance' (para 78)..

<sup>80</sup> Case C-20/12 *Giersch and others v Luxembourg*, EU:C:2013:411.

<sup>81</sup> Case C-20/12 *Giersch and others v Luxembourg*, EU:C:2013:411, para 51 (emphasis added).

more likely to demand a careful scrutiny of the rules limiting entitlement to benefits, including a scrutiny over the personal circumstances of the actual claimants. Broad brush rules, even when justified in theory, might be incompatible with EU law in practice.

Finally, it seems that pensioners might also benefit from some preferential treatment, possibly because of their connection with the internal market.<sup>82</sup> In *Brey*, the Court was faced with the compatibility with the Treaty of Austrian rules which had the effect of excluding pensioners from other Member States from a compensatory supplement. Application for the benefit implied, in fact, that the claimant did not possess sufficient resources to establish lawful residence in Austria. Mr Brey, a German national in receipt of a German pension, applied for the benefit and was refused it on those grounds. The Court of Justice therefore had to decide whether the rules at issue were compatible with the provisions of Directive 2004/38, and in particular with Article 7(1)(b), which stipulates that Union citizens wishing to reside in another Member State must have sufficient resources so as not to become a burden on the social assistance system of the host Member States, interpreted in the light of Article 14(3) of the same Directive, which provides that an expulsion measure shall not be the automatic consequence of a citizen's recourse to the social assistance system of the host Member State.

The Court found, first, that the conditional rights provided by the Directive to economically inactive citizens are based on the subordination of those rights to the 'legitimate interests' of the Member States, in that case the '*protection of their public finances*'.<sup>83</sup> It then turned to provide a broad interpretation of 'social assistance' for the purposes of Directive 2004/38, as all assistance that can be claimed by those who do not have sufficient resources to meet their basic needs.<sup>84</sup> The Court acknowledged that the fact that an individual who is not economically active needs to receive a benefit to supplement her pension might be an indication that she does not have sufficient resources to avoid becoming a burden on the social assistance system of the host State. But the Court then adopted the same interpretation that characterised its earlier case law: free movement rights derive directly from the Treaty; any limitation must be necessary and proportionate; and blanket rules are not compatible with that requirement but rather the relevant authority must make an assessment based on the personal circumstances of the claimant. In order to determine whether the claim would in fact impose a burden on the social assistance system, the national authority must make 'an overall assessment of the *specific burden* which granting that benefit would place on the social assistance system as a whole'<sup>85</sup> by reference to the personal circumstances of the claimant. And 'in order to ascertain more precisely the extent of the burden which that grant would place on the national social assistance system, it may be relevant, (...), to determine the proportion of the beneficiaries of that benefit who are Union citizens in receipt of a retirement pension in another Member State'.<sup>86</sup>

The Court in *Brey* therefore requires the national authorities to carry out a very precise assessment of the burden on the social assistance system – one that might in practice be almost impossible to

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<sup>82</sup> Regulation 883/2004 on the coordination of social security systems (2004) OJ L 166/1 as amended, consolidated version [2014] OJ C 1/1.?

<sup>83</sup> Case C-140/12 *Pensionsversicherungsanstalt v Brey*, EU:C:2013:565, para. 55 (emphasis added).

<sup>84</sup> Case C-140/12 *Pensionsversicherungsanstalt v Brey*, EU:C:2013:565, para. 61.

<sup>85</sup> Case C-140/12 *Pensionsversicherungsanstalt v Brey*, EU:C:2013:565, para. 77 (emphasis added).

<sup>86</sup> Case C-140/12 *Pensionsversicherungsanstalt v Brey*, EU:C:2013:565, para. 78.



make, especially by lower courts. In this respect, and as said before, *Brey* falls within the more traditional interpretation of the Treaty (and the Directive as ‘implementation’ of the Treaty rights); and, consequently, the right of Member States to rely on an economic justification to justify limiting a free movement right is interpreted extremely narrowly. In this respect, it is useful juxtaposing the rulings in *Brey* and *Dano*. Both cases related to economically inactive individuals, i.e. people whose right of residence would be established pursuant to Article 7(1)(b) of Directive 2004/38.

First of all, Mr Brey’s income was very low, given the fact that his wife was entirely dependent on him. They relied on earnings of EUR 1089.75 before tax, approximately half of which went on rent. This left the couple with a disposable income of less than EUR 560, through which they had to pay all living expenses including utilities. Ms Dano, on the other hand, was living free of charge at her sister (so possibly we could estimate that contribution at around a minimum of EUR 300), who also provided for her and her son’s maintenance. On top of this, Ms Dano was receiving EUR 307 in child maintenance benefits, entitlement to which had not been called into question by the German authorities. It seems therefore that, as a matter of fact, there was no huge difference in the resources available to Mr Brey and those available to Ms Dano, with Ms Dano having possibly slightly more disposable income in real economic terms.

Secondly, Mr Brey had no apparent connection to the host State, besides a decision to reside in the latter rather than in his state of nationality; Ms Dano, on the other hand, had joined a family member in the host State and had been present within its territory for a considerable period of time (three years or more, with her son actually having been born there). It could be presumed then that Ms Dano’s connection to Germany was stronger than Mr Brey’s connection to Austria.<sup>87</sup>

Yet, despite the above, both the mode of reasoning of the Court and the results achieved in the two cases are very different. Both rulings related, basically, to whether an economically inactive citizen is entitled to subsistence benefits of any sort, or whether recourse to such benefits *de facto* indicates lack of sufficient resources. In both cases, the claimants were in possession of a certificate issued by the public authorities; in both cases, the claimants were denied the benefits applied for (directly or indirectly) on the grounds that they did not fulfil the sufficient resources criterion, so that even though their presence might have been lawful it was not relevant to establishing legal residence for the purposes of accessing the benefits in question. In *Brey*, however, the Court starts from the premise of Union citizen’s entitlement: if the Union citizen is exercising her Treaty right, then any limitation to this right, including the sufficient resources requirement, must be interpreted narrowly and assessed in relation to the principle of proportionality.<sup>88</sup> A rule which simply excludes economically inactive Union citizens from a certain benefit is inconsistent with said principle insofar as the personal circumstances of the claimant cannot be taken into account.

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<sup>87</sup> The Court makes repeated references to the fact that Ms Dano had moved to Germany to receive benefits; however, there is nothing in the ruling or in the Opinion to suggest that was actually the case; rather the expression seems directly borrowed from the German legislation under consideration that excluded the benefits at issue for foreign work-seekers and those foreign nationals who had entered the national territory ‘in order to obtain social assistance’ (see *Dano* ruling, para. 26).

<sup>88</sup> See *Brey*, para. 70: ‘Lastly, it should be borne in mind that, since the right to freedom of movement is – as a fundamental principle of EU law – the general rule, the conditions laid down in Article 7(1)(b) of Directive 2004/38 must be construed *narrowly* (...) and in compliance with the limits imposed by EU law and the principle of *proportionality* (...)’ (emphasis added).

In *Dano*, the approach is tuned on its feet: this time, the rights conferred on Union citizens (and primarily the right to equal treatment) are subsumed in the rights granted by Article 24 of Directive 2004/38, which, being *lex specialis*, applies with preference/instead of the Treaty rights. But Article 24 (1) can only be actioned within the scope of the Directive and since, in the eyes of the Court, Ms Dano did not meet the requirements provided for in Article 7(1)(b) of that measure, she was then not entitled to equal treatment.

It is difficult to reconcile the two rulings; whilst *Dano* was a Grand Chamber ruling, and therefore might carry more weight, it did not overrule *Brey*. Advocate General Wathelet in *Dano* suggested that the two cases could be distinguished having regard to the national rules at issue: in *Brey*, anyone who applied for the benefit in question would be failing the sufficient resources hurdle, and therefore would not be able to establish lawful residence. In *Dano*, the benefit would be refused to those ‘whose right of residence is based on the sole objective of seeking employment or obtaining social assistance’.<sup>89</sup> Thym, on the other hand, reads the two rulings as expressions of different models of transnational solidarity, one based on territorial presence and the other on promoting social cohesion.<sup>90</sup>

Without prejudice as to the question of whether the two rulings can in fact be reconciled, to me the two rulings are symptomatic of the Court’s preference for certain (good) citizens: pensioners and students are both ‘good’.<sup>91</sup> The former have contributed to the economy (and the internal market more generally even when they have not migrated), the latter are well positioned to make a contribution to the economy in the future. Both categories therefore fit in the economic paradigm which remains the core of the European Union project. The same is true for those who are attempting to enter the labour market of another Member State: by definition, work-seekers are doing what European integration suggests they should do: move from one market to the other to ensure a better fit between supply and demand for labour. On the other hand, that is not true for those with no connection to the internal market: the Danos, but also the Trojanis, of this world continue to be left out of the integration project. Possibly this is both inevitable, given the fact that the European Union only possesses very limited redistributive power, and consistent with the dominant political mood post-recession, since there seems to be very little appetite for pure transnational solidarity.<sup>92</sup> But, the repatriation of welfare responsibilities almost exclusively to the State of nationality might signal the failure of the Union citizenship experiment, in that it seems clear that the latter is far from being an innovative form of supranational citizenship allowing its beneficiaries multiple, and more nuanced, links of belonging. Rather it reinforces the link between citizen and her State of nationality, also by strengthening that link so that absences to other EU states do not necessarily terminate the welfare responsibilities of the home state.

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<sup>89</sup> AG Wathelet’s Opinion in *Brey*, para 123.

<sup>90</sup> D Thym ‘The elusive limits of solidarity: residence rights of and social benefits for economically inactive Union Citizens’ (2015) 52 CML Rev 17.

<sup>91</sup> On the good/bad citizen see also L Azoulai ‘The (Mis)Construction of the European Individual. Two Essays on Union Citizenship Law’ EUI Working papers, 2014/14, [http://cadmus.eui.eu/bitstream/handle/1814/33293/LAW\\_WP\\_%202014\\_14.pdf?sequence=1](http://cadmus.eui.eu/bitstream/handle/1814/33293/LAW_WP_%202014_14.pdf?sequence=1).

<sup>92</sup> See e.g. ‘Angela Merkel dashes Greek hopes of rescue bid’ *The Guardian*, 11 February 2010; ‘Merkel reaches her overdraft limit’ Spiegel Online International (<http://www.spiegel.de/international/germany/merkel-reaches-her-overdraft-limit-greek-bailout-could-push-german-debt-through-the-roof-a-691802.html>), 28 April 2010; also F de Witte ‘Transnational Solidarity and the Mediation of Conflicts of Justice in Europe’ (2012) 18:5 ELJ 694.

## VI Conclusions

The first preliminary conclusion is that there is no absolute ‘dogma’ whereby economic justifications are incompatible with EU law. Rather, whether they are, or are not, compatible with the Treaties will depend very much on the aims pursued by integration in a given area. In the case of the internal market, one of the main aims of integration is to dispose of economic protectionism; economic justifications for discriminatory measures would allow Member States to engage in protectionist policies and are therefore inconsistent with the very *raison d’être* of the internal market. Conversely, non-discriminatory measures might be legitimately justified by policy considerations even when economic factors form part of that policy: public budgets are unfortunately finite, and most policies require funding. Economic considerations are therefore legitimate in pursuing other public policy aims. In relation to inward migration of non-economic actors with no link to the internal market, on the other hand, economic justifications are accepted by both the legislature and the Court: thus, the limits and conditions prescribed by Directive 2004/38, as more recently interpreted in the case law, ensure that Member States can shelter their welfare communities from economically inactive Union citizens.

The second conclusion is that whilst economic considerations seem to be paramount in relation to claims made by non-economically active citizens to the host welfare society, they become close to irrelevant in relation to claims made by migrants vis-à-vis their Member States of origin. This means that, on the one hand, the Court has become more sensitive to the political compromise made in Directive 2004/38, a compromise which clearly excluded a meaningful notion of transnational solidarity beyond the internal market. On the other hand, though, the Court engages in a close scrutiny of the reasons justifying the refusal, by the Member State of origin, of the possibility to export benefits in another Member State. In this way, it might fill a gap:<sup>93</sup> if solidarity is not provided for by the host Member State then, where possible,<sup>94</sup> it might have to be provided by the Member State of origin, and the economic burden of so doing is close to irrelevant. After all, had the claimant not moved to another Member State, she would have been able to draw (unchallenged) upon the welfare resources of her State of nationality.

The third conclusion is that this variable relevance of economic considerations might tell us something about the very nature of Union citizenship. The more recent case law demonstrates that its potential has imploded, so that we witness a reallocation of welfare responsibilities along traditional nationality lines, at least when there is no internal market/economic dimension. The transformative effect of Union citizenship is much more limited than earlier case law might have suggested: it empowers citizens to move also when economically inactive merely by calling into question the link between benefit entitlement and residence in the national territory. It is possible that in the current political climate this is as good as it gets; whether this amounts to ‘supranational’ citizenship is, however, open to debate.

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<sup>93</sup> Although possibly opening another gap in relation to co-ordination of social security benefits, see H Verschuere ‘Preventing “Benefit Tourism” in the EU: A Narrow or Broad Interpretation of the Possibilities offered by the ECJ in *Dano*’ (2015) 52 CML Rev 363.

<sup>94</sup> See e.g. Case C-406/04 *De Cuyper*, EU:C:2006:491.